No. 79-1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONNECTICUT BOARD OF PARDONS, ET AL., *Petitioners,*

v.

DAVID DUMSCHAT, *Respondent;*

JAMES BROWN, STANLEY CZAJA AND
JAMES SHELTON, *Intervening Respondents,*

CONNECTICUT BOARD OF PARDONS, ET AL., *Petitioners,*

v.

JAMES BROWN, STANLEY CZAJA AND
JAMES SHELTON, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the long-standing, consistent practice of the Connecticut Board of Pardons of granting sentence commutations to almost all prisoners serving life sentences has created a legitimate claim of entitlement to those commutations which requires the Board to provide reasons when it denies commutations petitions.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

Respondents adopt the statement of Petitioners.

JURISDICTION

Respondents adopt the statement of Petitioners.

STATEMENT OF THE CASE*

Respondents represent a class of approximately thirty-five inmates sentenced to terms of life imprisonment prior to the revision of the Connecticut Penal Code in 1971.[1] For these inmates, release from prison prior to the expiration of their effective minimum terms[2] occurs through a two step process. First, they are made eligible

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* Respondents adopt only so much of Petitioner's Statement of the Case as recites the proceedings below.

[1] Until 1971, Conn. Gen. Stat. §54-121 provided that "[w]hen any person is sentenced to the state prison, otherwise than for life or in connection with a sentence of execution for a capital offense, the court imposing the sentence shall establish a maximum and minimum term for which such convict may be held in such a prison." Under Connecticut law, only prisoners who have served their minimum terms of imprisonment are eligible for parole. Conn. Gen. Stat. §54-125. However, persons sentenced to life incarceration, like Respondents, have no minimum terms, and become eligible for parole only after having served twenty to twenty-five years in prison, depending upon the good time which they have earned. Conn. Gen. Stat. §54-125.

In 1971, the Connecticut legislature enacted a new statute, Conn. Gen. Stat. §53a-35, which required sentencing judges to affix minimum terms of from ten to twenty-five years to life sentence. Thus, if Respondents had been sentenced under the new penal code, they might already have become parole eligible.

[2] Prisoners sentenced to life imprisonment prior to the revision of the penal code have no minimum terms. *See* note 1, *supra.* However, since they can become eligible for parole after twenty to twenty-five years, this period serves as an effective minimum term as far as parole is concerned.

for parole when their sentences are commuted by the Petitioner, the Connecticut Board of Pardons[3] (hereinafter "State Board"). Second, the Board of Parole determines whether they should be released on parole.

Of Connecticut inmates serving life terms under the former statute, between seventy-five percent and ninety percent have their eligibility for parole accelerated by the State Board. (J.A. at 31, 33).* Such sentence commutation is tantamount to release because ninety percent of these lifers are paroled within a year after commutation,

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[3] The Connecticut Board of Pardons is a state agency established pursuant to §18-24a of the Connecticut General Statutes. This statute provides that the Board consist of five members: two attorneys, one person skilled in the social sciences, one physician, and a Justice of the Connecticut Supreme Court. Section 18-26 confers upon the Board the power to grant "conditioned or absolute" pardons. The form of relief most frequently granted is the commutation of an inmate's minimum sentence to time served and the consequent acceleration of his or her eligibility for parole. (Joint Appendix at 53, 59, 74-76). The Board almost never grants an absolute pardon to an inmate. (Joint Appendix at 75). Absolute pardons are reserved for ex-prisoners who wish to erase a long-standing conviction. (Joint Appendix at 68, 69). Such pardons are not at issue in the instant case.

* Citations to "J.A." are to the Joint Appendix filed with this Court. It should be noted that there is an error in the Index of the Joint Appendix. The transcript listed as "Partial Transcript of Hearing of March 9, 1978" is actually a partial transcript of the November 18, 1976 hearing. The transcript listed as "Parial [*Sic*] Transcript of Hearing of November 18, 1976" is actually a partial transcript of the March 9, 1978 hearing.

at their first appearance before the Connecticut Board of Parole. (J.A. at 33, 39). Virtually all the remaining ten percent are paroled within three more years. (J.A. at 40). As a result members of Respondent class expect to be released prior to the expiration of their effective minimum terms.[4]

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[4] The decision of the Second Circuit Court of Appeals, now before this Court for revfew, remanded this case to the District Court for further findings concerning the pattern and practice of the Connecticut Board of Pardons. While Respondents urge this Court to affirm the decision of the Court of Appeals, they also submit that this Court should dismiss the Writ of Certiorari as improvidently granted. *See N.A.A.C.P.* v. *Overstreet*, 384 U.S. 118 (1966). In *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) this Court stated:

> As has been may times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. . . . And, except in extraordinary cases, the writ is not issued until final decree. . . . The decree that was sought to be reviewed by certiorari at complainant's insistence was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application. . . .

See also Brotherhood of Locomotive Firemen & Engineermen v. *Bangor & Aroostock Railroad Co.*, 389 U.S. 327, 328 (1967). ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

Certiorari might also be dismissed on the ground that this case does not present an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rules 17.1. This case is extremely narrow in scope, resting on the peculiar practices and procedures of the Connecticut Board of Pardons. Furthermore, as has been noted above, it involves a small class of inmates sentenced under a statute which has been repealed.

The State Board shares this expectation. The Board's members are aware that their decision to reduce a sentence is equivalent to a decision to grant parole.[5] Accordingly, the Board has established elaborate adversary procedures in an attempt to ensure fair and reliable decision-making. These procedures include the right to be represented by an attorney (*Record*, Transcript of November 18, 1976 at 39-40), the right to inspect Pardon Board files (*Id.* at 40) the right to challenge inaccuracies in the files (*Id.* at 40), the right to present witnesses (J.A. at 67), and the right to submit documentary evidence (J.A. at 68). The State's Attorney may appear at these hearings to oppose the granting of relief (J.A. at 67).

The Board meets four times a year to consider the petitions submitted by inmates at Connecticut state prisons (J.A. at 81). At each sitting, the Board hears and

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[5] Richard Lublin, former Chairman of the State Board, responded to the following questions asked by District Judge M. Joseph Blumenfeld:

> Q. You did say that you're aware of the fact that parole is almost automatic following the granting of a pardon?
>
> A. That is correct.
>
> Q. And does that weigh with you, and how, in your decision-making? Or do you have a feeling that you're in no way passing the buck, but you're just passing him through the Parole Board?
>
> A. Yes. We feel we're opening the door pretty much and letting him go. . . .
>
> (*Record*, Transcript of November 18, 1976 at 42).

rules on approximately sixty petitions (*Record*, Transcript of November 18, 1976 at 32). After hearing the inmates' petitions, the Board retires and meets in closed session. The Secretary of the Board reads aloud the names of all the inmates whose cases have been heard, pausing after each name. If none of the Board members speaks, no vote is taken and the application is denied. If a member wishes to address the merits of a petition in greater depth, he or she may initiate discussion, which would then be followed by a vote. (*Id.* at 33). Four affirmative votes are required for the granting of relief. Conn. Gen. Stat. §18-27.

A prisoner is informed only of the outcome in his or her case. (*Record, Carrona* Transcript at 15).* Despite the procedural protections afforded during the hearing, the Board gives no reasons for its decisions. The only explanation prisoners whose sentences have not been commuted receive from the Board is a slip of paper stating: "The Board has granted you a denied." [*Sic*] (*Id.*)

Respondents in this case are the few "lifers" who have not been released, for they never reached the second step of Connecticut's parole system. Although Respondents Brown and Czaja had unblemished institutional records and only one prior conviction between them, some "lifers" made eligible for parole by the State Board had committed disciplinary infractions while im-

* Citations to "*Carrona* Transcript" are to the Transcript of Hearing in *Caronna* v. *Manson et al.* (D. Conn., Civil No. H-74-377) on September 25, 1975, which was incorporated in the Record of this case by stipulation.

prisoned and had lengthy prior records. Respondents' crimes[6] were no more serious than those committed by other prisoners whose sentences were commuted.[7] Nevertheless, Respondents were denied sentence commutations by the State Board. They still do not know why.

Respondent James Brown was sentenced in 1969 to life in prison for killing a woman friend. (*Record*, Pardon Board File No. 23121, "Connecticut State Prison Admission Summary"). He had no prior criminal record. (*Record*, Pardon Board File No. 23121, "F.B.I. Record"). He had no disciplinary citations during his eight year confinement. (J.A. at 12, 28). He had been employed in the shipping and receiving department at the Connecticut Correctional Institution at Somers. (J.A. at 12, 28). Since 1975, Brown had participated continuously in the prison's furlough program. (J.A. at 12, 28). He had attended classes in order to obtain an elementary school education, and learned woodworking in the hobby shop. (J.A. at 12, 28).

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[6] Czaja was convicted of second degree murder. Brown originally was convicted of second degree murder, but his conviction was overturned by the Connecticut Supreme Court. *State* v. *Brown*, 157 Conn. 492 (1969). He was then tried and convicted of first degree murder.

[7] At the time Respondents were sentenced, life sentences could be imposed in Connecticut upon persons convicted of first and second degree murder, or who caused the death of others by wilfully tampering with railroads, or who endangered the life of others by wilful arson, or who "of malice aforethought, and by lying in wait," put out "the eyes of another, so that the person is thereby made blind," or cut out "the tongue . . . or . . . all or any of the privy members of another." Conn. Gen. Stat. §§53-10, 11.

Similarly, Respondent Stanley Czaja had had no disciplinary citations. (J.A. at 14, 28). By 1977, when Respondents intervened in this case, fifteen years had passed since Czaja had been sentenced for the drunken slaying of a state trooper who had attempted to break up a family argument. (*Record*, Pardon Board File No. 20319, " Connecticut State Prison Admission Summary"). Like Brown, he had been a model prisoner, participating continuously in the institutional furlough program since 1972. (J.A. at 14, 28). Czaja had been employed at the institution in a variety of jobs, including prison librarian (J.A. at 14, 28). Czaja had had only one conviction, for petty larceny prior to his shooting of the trooper. (*Record*, Pardon Board File No. 20319, "Criminal History").

The records of lifers whose sentences were commuted contrast sharply with those of Respondents. For example, James Carrona, who had killed his estranged wife, had had seventeen citations for misconduct in prison, including "fighting, disobeying a direct order, threatening a staff member, violation of inspection." (*Record, Carrona* Transcript at 43). He had an equivocal psychiatric report in his record. (*Record, Carrona* Transcript at 50). David Dumschat, who filed the original action in this case and whose sentence was commuted by the State Board to time served on the very day that the District Court ordered the Board to tell him why his commutation petition had been denied, had had three disciplinary citations, including one for "handling contraband" and another for intoxication. (*Record*, Pardon

Board File No. 21057, p. 2). His crime had involved the shooting of two people — his former wife and the doctor for whom she worked. (*Record*, Pardon Board File No. 21057, "Summary of Offense", p.2). Mr. Lublin, testifying seven months before the Board commuted Mr. Dumschat's sentence, said of Mr. Dumschat:

> We're cognizant of the fact that almost everybody who gets turned over by the Board of Pardons to the Parole Board is released. And in our opinion he would be a threat to society.

Record, Transcript of November 18, 1976, p. 36.

James Shelton, the third Respondent intervenor, eventually had his sentence commuted on October 23, 1978. (Petitioner's Brief at 5). Shelton had served approximately nine years of the life sentence he received for the murder of a friend's husband. (*Record*, Pardon Board File No. 23068, Report of Edward A. Murphy, Probation Officer, p. 1). Unlike Dumschat and Carrona, there were at least three letters in his file recommending release. (*Record*, Pardon Board File No. 23068, Letters of Ernest Begin, George N. Pechka and George E. Johnson). Shelton, however, also had a criminal history which included forty-three convictions. (*Record*, Pardon Board File No. 23068, Report of Edward A. Murphy, Probation Officer, pp. 3-5). From 1945 to his incarceration in 1964, he had been convicted of at least one offense in every year except 1952. (*Id.* pp. 3-5). Paul Mc-

Quillan, Chairman of the Board of Pardons, testified in this action about Shelton on March 9, 1978 as follows:

> And I think to today he doesn't appreciate perhaps, the value between human life and the material things, and it's based on no educational background, a sharecropper coming off a farm, and I don't think that he had that evaluation. (J.A. at 52).

Nonetheless, less than a year later, James Shelton's sentence was commuted by the State Board.

The exemplary records of Respondents Brown and Czaja distinguish them from the criminal histories and disciplinary citations accumulated by Carrona, Dumschat and Shelton. Carrona, Dumschat and Shelton all received sentence commutations from the State Board. All Brown and Czaja received were slips of paper stating: "The Board has granted you a denied."

SUMMARY OF ARGUMENT

The record reflects an "almost invariable practice" of the Connecticut Board of Pardons of accelerating the parole eligibility of most Connecticut prisoners serving life terms. *Dumschat* v. *Board of Pardons (I)*, 593 F.2d 165, 166 (2d Cir. 1979). Such parole acceleration by the State Board is tantamount to a parole release decision. The long-standing, consistent policy and practice of the State Board results in "[t]he overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms . . ." *Dumschat* v. *Board of Pardons (II)*, 618 F.2d 216, 220 (2d Cir. 1980).

The State Board's practices generate a legitimate expectation on the part of life inmates that meritorious sentence commutation petitions will be fairly considered and granted. *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1 (1979).

The State Board shares this expectation. It consistently commutes the sentences of life inmates in order to induce them to maintain good behavior and provide services to the state while incarcerated. The State has thus engendered the inmates' expectation that meritorious commutation petitions will be fairly considered and granted, and has benefited from that mutual understanding.

The settled practice of the State Board establishes Connecticut Law concerning the entitlement of life inmates to sentence commutations. *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 369; *Hughes* v. *Superior Court of California,* 339 U.S. 460, 466-7 (1950); *Konigsberg* v. *State Bar of California*, 366 U.S. 497 (1961). This settled practice has generated mutually explicit understanding between the Board and life inmates which confers upon those inmates an entitlement to sentence commutations. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972). *Perry* v. *Sindermann*, 408 U.S. 593 (1972). *Cf. Leis* v. *Flynt*, 439 U.S. 438 (1979). The Constitution requires the State Board to provide reasons when it denies the sentence commutation petitions of Connecticut Prisoners serving life terms, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). In light of the insignificant burden which a reasons requirement

would impose on the State Board, the important benefits that would flow from the provision of reasons, and the vital interest at stake in the commutation proceeding, a statement of reasons is the minimum process due a life inmate whose commutation petition is denied.

ARGUMENT

I. The Long-Standing, Consistent Policy And Practice Of The Connecticut Board Of Pardons Of Granting Sentence Commutations To Almost All Inmates Serving Life Sentences Has Created A Legitimate Claim Of Entitlement To These Commutations.

The Court of Appeals, after carefully reviewing the District Court's findings of fact, concluded that "[t]he overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms gives them a constitutionally protected liberty interest in pardon proceedings." *Dumschat* v. *Board of Pardons (II)*, 618 F.2d 216, 220 (2d Cir. (1980). This liberty interest is created by the Board's "almost invariable practice" of reducing the minimum sentences of life inmates. *Dumschat* v. *Board of Pardons (I)*, 593 F.2d 165, 166 (2d Cir. 1979).

Thus, while the sentence commutation statute under which the Board operates is couched in discretionary terms,

> Statutory or constitutional language . . . is not the only ground upon which a legitimate expectation of liberty or property may rest. Such an expecta-

> tion, with attendant due process rights, may also be based on regulations, policies, understandings, contractual arrangements or institutional practices.

618 F.2d at 219.

Law is expressed as much by the practices and policies of state officials as it is by the language of state statutes. In *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362 (1946). This Court held that state practice can establish what state law is, even where such practice differs from what is contained in state statutes. Justice Frankfurter, writing for the Court, reasoned:

> It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often toughter and truer law than the dead words of the written text.

310 U.S. at 369.

In *Hughes* v. *Superior Court of California for Contra Costa County*, 339 U.S. 460, 466-7 (1950), the *Nashville* doctrine was followed in a due process case which held that the federal courts could look to the acts of a state judiciary, as well as those of the legislature, to determine what state policy was and whether its application violated the Constitution. The same rationale was

held to govern judicial rules controlling state bar admissions in *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 45 (1961), and was applied in *Poe* v. *Ullman*, 367 U.S. 497 (1961), to declare a state statute effectively repealed by the executive's practice of non-enforcement. In *Poe* this Court was presented with a challenge to Connecticut statutes that prohibited the use and the giving of medical advice regarding the use of contraceptives. Applying Justice Frankfurter's *Nashville* precept, this Court held that no Article III controversy existed because these statutes had fallen into desuetude.

> The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. "Deeply embedded traditional ways of carrying out state policy. . ." — or not carrying it out — "are often tougher and truer law than the dead words of the written text." *Nashville C. & St. L. Ry. Co.* v. *Browning*, 310 U.S. 362, 369.

367 U.S. at 502.

The type of "deeply embedded traditional [way] of carrying out state policy" described by Justice Frankfurter in *Nashville*, and recognized by this Court in numerous subsequent decisions, is present in this case. It is a practice which has created a legitimate expectation on the part of life inmates in Connecticut prisons that they will receive sentence commutations from the Board which will make them eligible for release prior to completion of their twenty-five year minimum terms.

Both the District Court and the Court of Appeals found convincing evidence of this practice in the testimony of Bernard Gates, Chairman of the Connecticut Parole Board, concerning his personal knowledge of the practices of the Connecticut Board of Pardons over a thirty-five year period. Based on Mr. Gates's testimony the District Court found that

> at least seventy-five percent of all lifers received some favorable action from the pardon board prior to completing their minimum sentences.

432 F. Supp. at 1314. In fact, the State Board may commute the minimum sentences of as many as "85 or 90 percent of the [life] inmates" who appear before it. 618 F.2d at 220 n.5.

Mr. Gates testified that during his nine years as Parole Board Chairman only three of the many lifers who had appeared before the Parole Board had served as much as twenty years. *Id.* It was also Mr. Gates who emphasized the link between sentence commutation and parole. He testified that approximately ninety percent of the life inmates whose eligibility for parole had been accelerated by the Board of Pardons actually were paroled within their first year of eligibility. (J.A. at 33.) Virtually all of the remaining inmates were paroled within a few years of obtaining parole-eligibile status from the Pardons Board. (J.A. at 39-40.)

In light of Mr. Gates's testimony, Petitioners' claim that the Connecticut Board of Pardons is a insular body divorced from the parole process is untenable. (Peti-

tioners' Brief at 11.) Richard Lublin, former Chairman of the State Board, conceded that the members of the Board realize the true nature of its function.

> We're cognizant of the fact that almost everyone who gets turned over by the Board of Pardons to the Parole Board is released.

Record, Transcript of November 18, 1976 at 40.

The long-standing and consistent practice of the State Board has created the same expectation of parole as was generated by a statute in *Greenholtz* v. *Nebraska Penal Inmates*, 442 US. 1 (1979).[8] This Court has consistently looked to the practices of state agencies in determining whether a legitimate expectation entitled to due process protection has been created by the State. In *Board of Regents of State Colleges* v. *Roth*, 408 U.S 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the Court emphasized that

> . . ."property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." [Citations omitted].

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[8] Petitioners claim that the Second Circuit's decision is in conflict with this Court's opinion in *Greenholtz*. However, the Second Circuit's acceptance and careful consideration of *Greenholtz* is evidenced not only in its opinion in this case, but also by its holding in *Boothe* v. *Hammock*, 605 F.2d 661 (1979). The opinion in *Boothe*, circulated to all active judges of the Circuit before filing, *see* 605 F.2d at 665 n.5, overruled several previous Second Circuit decisions which the Court deemed inconsistent with *Greenholtz*.

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

408 U.S. at 601.[9]

The Court emphasized in *Perry* that these "mutually explicit understandings" need not have a basis in a written document to create a "legitimate claim of entitlement." "Mutually explicit understanding" may be based on "the policies and practices of [an] institution." 408 U.S. at 603. The Court analogized the circumstances which generate such understandings to "implied contracts," *Id.* at 602, and to "unwritten 'common law.' " *Id.*

In this case the District Court and the Court of Appeals found that the State Board has created an unwritten common law of sentence commutation and parole acceleration for Connecticut life inmates. Through its consistent policy and practice of reducing the minimum terms of life inmates, the State Board has encouraged these prisoners to rehabilitate themselves, to maintain exemplary institutional conduct records, and to expect that meritorious commutation petitions will be fairly considered and granted.

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[9] It should be noted that this Court has never recognized a difference between liberty and property interests as far as the creation of legitimate claims of entitlement are concerned. In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 542 (1972), the Court held that it had "never adopted the distinction between personal liberty and proprietary rights" with respect to jurisdiction conferred on the district courts by 28 U.S.C. §1343, one of the provisions enacted to enforce the Fourteenth Amendment.

The expectation of sentence commutation is not unilateral. By generating in inmates a well-founded belief that they will be released, the State expects that "lifers" will control their institutional behavior and avoid activities which would reduce the likelihood of commutation. In the words of Paul McQuillan, Chairman of the Pardons Board:

> . . . [w]e are acutely aware of the fact that within that prison institution every bit of our conduct is closely watched, and if there is an indication of any unfairness it causes a lot of difficulty; and the warden is, of course, very concerned about that sort of thing.

J.A. at 55. In effect, there is an unspoken understanding between the State Board and inmates. The terms are simple: If the inmate cooperates with the State, the State will exercise its parole power on the inmate's behalf. Both the State and the inmate recognize those terms. Each expects the other to abide by them.

This mutual understanding is extremely important to the State. If a prisoner conforms to institutional policies, and volunteers his services to the State when he is not legally bound to do so, the State benefits by diminished tensions at the prison and the savings in manpower hours and other resources which inmate cooperation affords. In addition, an atmosphere of cooperation is thereby engendered at the state's penal institutions which makes it easier for the State to attract and retain competent employees.

In this case Respondents met the State's expectation of inmate cooperation. Respondents Brown and Czaja compiled excellent disciplinary records. They also provided the State with a wide variety of services. The State expected and benefitted from each Respondent's compliance.

This case, therefore, differs significantly from *Leis* v. *Flynt*, 439 U.S. 438 (1979), in which this Court was asked to hold that "a constitutional right can be created — as if by estoppel — merely because a wholly and expressly discretionary state privilege has been granted in the past." 439 U.S. at 444, n.5. The issue in that case was whether the past practice of Ohio judges of permitting out-of-state lawyers to appear *pro hac vice* in Ohio courts had conferred upon all out-of-state lawyers a constitutional right to represent clients in Ohio courts.

Unlike the situation in *Leis,* in this case Connecticut life inmates and the State Board have a "*mutual* understanding," 439 U.S. at 443 (emphasis in original), that meritorious commutation petitions will be fairly considered and granted. This mutual understanding is reflected not only in the longstanding, consistent policy and practice of the State Board in granting sentence commutations to almost all life inmates, but also in the important benefits obtained by the State in terms of inmate cooperation, good behavior, and labor induced by inmate expectation of early release. The State's expectation is further evidenced by the elaborate procedures established by the State Board for the hearing of inmate petitions.

Connecticut's sentence commutation procedure includes notice, access to files, the right to an attorney and the right to present witnesses and submit letters. (*Record*, Transcript of November 18, 1976, at 39-40; J.A. at 67-68.) The State's Attorney from the county where the inmate was convicted may appear and be heard in opposition to the petition for sentence commutation. (J.A. at 67). While there are no written criteria for granting sentence commutations, there are explicit policies for the process which is to be followed. The Board has maintained published rules since its inception in 1883. *Dumschat* v. *Board of Pardons*, 432 F. Supp. at 1312, n.7.

Although by affording some procedural safeguards the State does not create a right to those or additional procedures, *Cofone* v. *Manson*, 594 F.2d 934, 938-9 (2d Cir. 1979), the use of judicial procedures does reflect an effort by the Board to achieve accurate decision-making, and an expression of the Board's intention to grant meritorious commutation petitions. The adoption of judicial mechanisms in the sentence commutation process creates an expectation that meritorious commutation petitions will be fairly heard and granted. The presence of a Justice of the Connecticut Supreme Court on the State Board reinforces this conclusion.

The State's apparent aim in developing and implementing the procedures of the Board was to assure Respondents that the Board would follow a reliable procedure for determing whether facts existed which would justify sentence commutations and which would provide

the inmates an opportunity to present such facts. Thus, the State Board's adoption of these procedures buttresses the conclusion that the Board and Respondents share a mutual understanding that the Respondents are entitled to sentence commutations when they present meritorious petitions.

By commuting the sentences of almost all lifers in Connecticut prisons, and by establishing elaborate procedures for commutation hearings, the State Board has created a mutually explicit understanding in which State and inmate share expectations of good behavior by the inmate and early release by the State. After having heard all the evidence in this case, the District Judge held:

> Where, as in Connecticut, the State has set up a statutory process for granting commutations of sentence, established an administrative body to hear petitions and implement that statute, and granted such relief to at least three-quarters of the long-term inmates appearing before it, I think it clear that the denial of a pardon to such inmates implicates a liberty interest requiring due process protections.

432 F. Supp. at 1314.

By its long-standing, consistent policies and practices Connecticut has created its own "institutional common law," *see Perry* v. *Sindermann*, 408 U.S. at 602-603, that Connecticut prisoners serving life sentences will not be denied sentence commutations without due process of law.

II. The Connecticut Board Of Pardons Is Required To Provide Reasons When It Denies Sentence Commutation Petitions Of Prisoners Serving Life Terms.

James Brown and Stanley Czaja have maintained exemplary institutional conduct records during their long periods of incarceration. Neither has received a single disciplinary citation. Both have performed a variety of useful services for the State. Both have been permitted on a regular basis to leave the institution on furloughs, and have participated in rehabilitative programs. James Brown has no other criminal convictions. Stanley Czaja has one other minor conviction for petty larceny. Brown has been incarcerated for thirteen years, Czaja for eighteen years. Both Brown and Czaja have petitioned the Connecticut Board of Pardons repeatedly for sentence commutations. All of their petitions have been denied without explanation.

If the State Board has reasons for denying Brown and Czaja sentence commutations, those reasons are not apparent. Other prisoners with worse institutional records and criminal histories have received commutations from the Board. James Carrona had seventeen disciplinary citations and an equivocal psychiatric report in his file. David Dumschat had three disciplinary citations. James Shelton had a criminal record of forty-three convictions. All received sentence commutations.

In the face of such decisions the need for reasoned explanations is apparent.

A state agency which has established an "almost invariable practice," *Dumschat* v. *Board of Pardons (I)*, 593 F.2d 165, 166 (2d Cir. 1979), of granting sentence commutations to life prisoners, and which has granted commutations to those with worse records than inmates such as Brown and Czaja, should, at a minimum, be required to explain the reasons for such denials.

In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), this Court established the criteria for determining what process is due once a constitutionally protected entitlement has been found to exist.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

In this case "the private interest that will be affected" by official action is enormous. The State Board's decision to grant or deny a sentence reduction effectively determines whether an inmate will be freed before the expiration of his or her minimum term. In nine out of ten cases, positive action by the Board of Pardons results in a precise determination of the date of release, subject only to the minor variations which arise from the fact that the Parole Board does not meet in

continuous session. In the remaining ten percent of cases, the Pardon Board's decision does not set a date for release, but it effectively ensures that release will be attained within, at most, four years. (J.A. at 40.)

The granting of a commutation petition may reduce a life prisoner's term of incarceration by many years. The few members of the class of life inmates whose sentences are not commuted will spend at least twenty years behind bars. Because a denial by the Board precludes early release, and commutation is tantamount to setting a date for it, the decision of the State Board is crucial to the inmate serving a life term and affects a valuable liberty interest.

The second part of the *Mathews* equation is the risk of erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional safeguards. The State Board's existing procedures are inadequate to assure inmates fair, reasoned decisions on their commutation applications. Under the present system the State Board listens to case after case in uninterrupted succession. At the end of a session the Board decides the cases it has heard. A particular case is discussed only if one of the Board members wishes to make a comment about that case. If no member comments, the petition is denied.

Under this system it is impossible to know that the Board members have based their decisions on rational grounds, or on any grounds at all or that their collective

silence reflects anything more than fatigue.[10] A Board member does not know why the other members have responded with silence to a petition, and may not even know why he himself has. Not even the Board members themselves can be sure that their decision to deny an inmate relief is not based on constitutionally impermissible grounds, such as race or religion. Petitioners concede that decisions on such grounds are improper. (Petitioner's Brief at 19.) The safeguards provided at the hearing stage of the process are rendered meaningless by the total absence of any protection at the decision-making stage.

The safeguard which respondents seek to add, and which both lower courts found necessary, is the provision of a statement of reasons when a commutation is denied.[11]

[10] Former Chairman of the Pardons Board, Richard Lublin, described the process: "It's very emotionally exhausting to go over 40, 50 cases a day." *Record, Carrona* Transcript at 50.

[11] Professor Kenneth Davis commented on the old federal parole system which did not require reasons when parole was denied

> The failure to state reasons has additional consequences. Even the most flagrant abuse of discretion is likely to go uncorrected. If a board member is in such a hurry to get to his golf game that he votes in sixteen cases without looking inside the files, no one under the board's system can ever know the difference, even though the personal liberty of sixteen men may be at stake. How could a board member have less incentive to avoid prejudice or undue haste than by a system in which his decision can never be reviewed and in which no one, not even his colleagues, can ever know why he voted as he did? Even complete irrationality of a vote can never be discovered.

The Court of Appeals identified several important purposes a statement of reasons would serve in rationalizing the Connecticut sentence commutation process for life inmates:

> . . . [T]he record amply supports Judge Blumenfeld's conclusion that a mandatory statement of reasons has a number of salutory consequences. The need to give reasons encourages fair and thoughtful deliberations by the board, thus protecting against arbitrary and constitutionally impermissible decisions. Moreover, it promotes consistency, an important consideration in light of the board's frequent changes in personnel. Finally, it helps inmates to correct misunderstandings by the board or to remedy their own behavioral or other problems which influenced the board's denial of relief.

618 F.2d at 221.

This requirement of reasons compels at least a cursory discussion of each case; silence alone would no longer suffice as a basis for a denial.[12] As this Court

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Should any men, even good men, be unnecessarily trusted with such uncontrolled discretionary power?

K. DAVIS, *Discretionary Justice* at 128-129 (1971).

When Congress enacted the Parole Commission Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219, 18 U.S.C. §§4201 *et seq.*, it added a reasons requirement. 18 U.S.C. §4206(b) (" . . . If parole is denied such notice shall state with particularity the reasons for such denial.").

[12] A member who merely votes yes or no, with no findings or reasons, may in human fashion give in to emotions or whims. Subjecting his findings and reasons to the view of outside critics — and inside critics — may cause him to try to make his

observed in one of its landmark labor decisions of the past decade, the requirement of reasons is one of the most effective ways to ensure careful consideration of a controverted matter

> [A]"reasons" requirement promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies. . .

Dunlop v. *Bachowski*, 421 U.S. 560, 572 (1975).[13]

Reasons would require the State Board not only to direct its attention to each individual case before acting on commutations, but to base its decisions only on those grounds which are relevant:

> . . . [D]iscretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

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action appear rational, and the easiest way to appear rational is usually to be rational. Furthermore, equal justice will be more likely if cases can be compared.

K. DAVIS, *Discretionary Justice* at 131 (1971).

[13] Nearly a half century ago, Jerome Frank described the positive role reasons play in careful decision-making:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose — that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. (Footnotes omitted.)

U.S. v. *Forness*, 125 F.2d 928, 942 (2d Cir. 1942).

Gregg v. *Georgia*, 428 U.S. 153, 189 (1976) (Opinion of Stewart, Powell and Stevens, JJ.)

The need for reasons is especially acute in this case because of the absence of any apparent standards. Although the State ordinarily is presumed to act fairly and rationally, the facts of this case not only rebut such a presumption, but suggest the contrary conclusion. The Board denies relief to only a few of the inmates who apply for sentence commutations. Because the Board gives no reasons for its denials and because no standards can be inferred from its decisions, there is no meaningful basis for distinguishing between those cases in which commutations are granted and those in which they are not. *Cf. Furman* v. *Georgia,* 408 U.S. 238, 313 (1972) (White, J. concurring).

In his concurrence in *Furman* Justice Brennan wrote:

> When a country of over 200 million people inflicts an ususually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of non arbitrary infliction . . .
>
> When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.

Id. at 293. The same conclusion is inescapable here. Only a small number of lifers are singled out for harsher

treatment; and like defendants sentenced to death prior to *Furman*, they receive no explanation.

A decision with reasons appears fair and rational to its recipient. The appearance of fairness is essential in the prison setting, as was conceded by Paul McQuillan, Chairman of the Pardon Board:

> . . . [W]e are acutely aware of the fact that within that prison institution every bit of our conduct is closely watched, and if there is an indication of any unfairness it causes a lot of difficulty: and the warden is, of course, very concerned about that sort of thing.

J.A. at 55.

The more comprehensible and fair the system appears to inmates, the more conducive the system will be to rehabilitation — one of the primary goals of incarceration and "the ultimate purpose of parole." *Greenholtz* v. *Nebraska Penal Inmates*, 442, U.S. at 13.

In *Greenholtz* this Court wrote:

> [P]arole determination . . . must include consideration of what the entire record shows up to the time of the sentence, including the gravity of the offense in the particular case. The behavior record of an inmate during confinement is critical in the sense that it reflects the degree to which the inmate is prepared to adjust to parole release.

442 U.S. at 15. When these criteria for parole decision-making are applied to this case, the State Board's decisions denying sentence commutations to Respondents

Brown and Czaja, and granting commutations to inmates like Carrona, Dumschat and Shelton, appear irrational.

The requirement of reasons is not necessarily synonymous with the requirement of a full judicial opinion. Reasons may be brief and circumscribed in their scope. Voluminous, detailed explanations are not necessary and are not sought by the Respondents here. *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1, 16. Respondents ask only that they be told why they have been denied a sentence commutation when others who have compiled no better institutional records and commited crimes no less serious have received commutations.

The third factor which must be considered by this Court in determining whether a statement of reasons should be part of the process that is due is the burden which such a statement would impose upon the State Board. Paul McQuillan, Chairman of the Board of Pardons, testified that no significant fiscal or administrative burden would be imposed upon the Board if the agency were required to furnish life inmates with reasons for denial of sentence commutations. The Board already sends each prisoner a piece of paper on which its decision is announced, and the inclusion of a short statement of reasons and underlying facts in the notices provided to the few members of the Respondent class would work no hardship upon the Board. (J.A. at 60, 61) Mr. McQuillan conceded that the imposition of a requirement that the Board furnish each life inmate with a short statement of reasons upon denial of relief would not re-

quire the Board to hold fewer sessions or limit its consideration of prisoner petitions. (J.A. at 71.)

Unlike the Nebraska procedure which this Court approved in *Greenholtz*, 442 U.S. at 16, the Connecticut Board of Pardons does not inform the life inmate whose petition is denied in what respect he falls short of qualifying for a sentence commutation. The elaborate procedures the State Board has already established are debased by the absence of reasons for its decisions. In light of the insignificant burden which a reasons requirement would impose on the State Board, the important benefits that would flow from the provision of reasons, and the vital interest at stake in the commutation proceeding, a statement of reasons is the minimum process due a life inmate whose commutation petition is denied.

CONCLUSION

The State's reliance on this Court's decision in *Schick* v. *Reed*, 419 U.S. 256 (1974), is misplaced. What is at issue in this case is not the occasional exercise of the sovereign's "plenary" pardon power — such as that of the President under Article II of the Constitution — but the regular practice of a state agency, created by statute, with a unique function and history.

The "almost invariable practice" of the Connecticut Board of Pardons of reducing the minimum sentences of life inmates in order to accelerate their parole eligibility, *Dumschat* v. *Board of Pardons (I)*, 593 F.2d 165, 166 (2d Cir. 1979), had resulted in "[t]he overwhelming likelihood that Connecticut life inmates will be pardoned

and released before they complete their minimum terms." *Dumschat* v. *Board of Pardons (II)*, 618 F.2d 216, 220 (2d Cir. 1980). This long-standing, consistent policy and practice of the State Board has given Connecticut life inmates a legitimate expectation that their sentences will be commuted prior to the expiration of their minimum terms. The Board shares this expectation. It expects prisoners serving life sentences to exhibit good behavior while incarcerated and to perform services for the State in order to obtain a sentence commutation. This mutually explicit understanding has conferred upon Respondents the right to a reasoned explanation when their commutations petitions are denied.

For these reasons the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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